GOD IN AMERICAN LAW

BY HARRY HIBSCHMAN

In the fair State of Jersey, not long ago, some of the pious brethern who every so often resurrect the old Blue Laws and undertake to impose them on a stiff-necked generation, caused the arrest of a wicked vendor of goods who had ventured to expose them for sale on the Sabbath. He was haled forthwith before a justice of the peace, tried, found guilty, and fined. But he appealed and made a boomerang of the Sunday law, for on his appeal he argued, and the Supreme Court agreed with him, that it was as illegal to try him on Sunday as it was for him to sell goods on Sunday. (Van Beuren *v.* Board of Com., 153 Atl. 260.) There was a similar case in New York a few years ago. Some votaries of chance were arrested on Sunday and taken before a magistrate, and there they pleaded guilty. But a day or two later they regretted their action and appealed to the County Court, where Judge Turk ruled that no trial could legally be held on Sunday and that a defendant could not waive the law by pleading guilty or otherwise. (People *v.* Mantei, 134 Misc. 529.)

Judge Turk's opinion in the case is of interest because in it he traced the development of the law on the subject and also revealed the judicial attitude that still prevails. He pointed out that in early times the courts among the Christians did sit on Sunday, but that Constantine in 321 A.D. decreed that judges and magistrates should rest "on the venerable day of the sun". Later, in 517, a council of the Church declared Sunday a non-judicial day and forbade any court proceedings on it. Of this canon Judge Turk said: "It was adopted into the Common Law and it has been consistently held from that time on that, under the Common Law, no judicial act ought to be done on the Sabbath." In other words, it is still a rule of law in the United States that courts cannot sit on Sunday, in the absence of a statute permitting it, because away back in 517 an Asiatic church council adopted a canon to that effect! Judge Turk concluded his opinion with the declaration that it was all a matter of public policy and that "to hold otherwise [than he did] would break down and destroy those splendid principles of Sunday observance which have come down to us for many generations long past."

As this case shows, many laws still in effect in the United States, either by statute or as a part of the Common Law, have been molded by ideas of God and His will, and religious preconceptions still influence, whether consciously or unconsciously, the actions of legislators, executives, and judges. Originally law and religion were inseparable, law was conceived to be the word of God himself, and Moses is still traditionally the world's great law-giver. So literally did the Puritans and the other early settlers of America take this conception to heart that in some instances they specifically adopted the Scriptures as secular law. In fact, the

Vermont General Assembly, as late as 1778, declared "the laws as they stand in the Connecticut law-book, and in defect of those laws, the plain word of God ascertained in the Scriptures," to be "the law of the land until the Legislature shall have time to digest and enact a code adopted to the condition of the country." To be sure, there was in that provision an intimation that God's laws might be improved upon for the Green Mountain boys; but, taken as a whole, it reflected the view that has been generally accepted during all our history and that was expressed by the worthy president of the University of Kentucky as recently as 1915 in an address to the students in the College of Law. "The Bible", said he, "is the foundation of modern law."

In England the Court of King's Bench declared in the reign of Queen Elizabeth that "in almost all cases the Common Law was grounded on the law of God", citing as its authority the 27th chapter of Numbers. Later Sir Matthew Hale made a famous declaration that subsequently became a maxim of English law. It was that "Christianity is a part of the Common Law of England." Nearly a century later Sir William Blackstone, in the introduction to his Commentaries, wrote: "Upon these two foundations, the law of nature and the law of revelation, depend all human laws." Later, when he came to write about crimes, Blackstone began his classification with "such as more immediately offend Almighty God by openly transgressing the precepts of religion, either natural or revealed."

Hale's declaration was accepted as sound by American courts at an early date, and it became axiomatic that Christianity was a part of the law of the land, having been inherited as a part of the Common Law when the States became independent. The Pennsylvania Supreme Court reiterated this maxim as recently as four years ago; and even the Supreme Court of the United States has given it its approval. "Our laws and our institutions," said the Supreme Court of Illinois, "must necessarily be based upon and embody the teachings of the Redeemer of mankind. It is impossible that it should be otherwise; and in this sense and to this extent our civilization and our institutions are emphatically Christian." (Richmond *v.* Moore, 107 Ill. 429.) Meanwhile, the highest court of England held flatly in 1917 that Hale was wrong and that Christianity never was a part of the Common Law of England. (Bowman *v.* Secular Society, Ann. Cas. 1917D, 761.)

The words of the Illinois Supreme Court illustrate the second way in which the Lord's hand is heavy upon our jurisprudence—through the religious psychology of legislators and judges. We talk, of course, of a government of laws as distinguished from a government of men. But when we do so we are either deluded or dishonest, for there is no such thing as a government without men and, therefore, no such thing as a government free of the human equation. And so long as the human equation enters in so long does the idea of religion enter in.

Men, whether in legislative halls, in administrative chairs, or on the bench, remain mere bipeds of the human species, reflecting their blood and their culture, regardless of their position. Their theological beliefs are as much a part of them as their viscera. These beliefs always help to determine what laws shall be passed and how they shall be interpreted. They become legal and juridical yardsticks. Thus a government secular in theory is never secular in fact, and jurisprudence is always shot through with theology.

II

The whole body of our Sunday laws is religious in origin and purpose. The Christian Sabbath has been incorporated into American law. Courts nowadays protest that this is not true: they pretend to uphold Sunday legislation on social grounds alone. But they are clearly guilty of hypocrisy or of self-deception, for the historical reason for Sunday laws is the protection of the Christian religion. As was said by a Pennsylvania court: "Sunday is a part of Christianity. Upon its peaceful observance Christianity in a great measure depends." To which the court then added a fearsome prophecy: "Destroy this day, and a revolution of the most astounding character is produced."

The Supreme Court of Pennsylvania rendered one of the most illuminating decisions on this subject. Two separate opinions were filed. One, by Judge Bell, sustained the 1794 Sunday law on the ground that it was "essentially but a civil regulation" but argued that as a religious regulation it would be unconstitutional, but the other, by Judge Coulter, said: "I wish it to be distinctly understood that I believe the laws constitutional because they guard the Christian Sabbath from profanation. We are a Christian people and State. I do not recognize the right of the Legislature to make a day of secular cessation from labor independent of the Christian Sabbath." That is a frank and correct statement of the reasons and motives behind all Sunday legislation, however much pious judges may protest that they proceed on purely social grounds when they uphold and enforce it.

As a matter of historical fact, the Pennsylvania law is the product of an even deeper religious superstition than the mere imagined need of observing the Lord's Day. It was passed in its present form in 1794, following the yellow fever epidemic of 1793, because the people of the State thought that the epidemic had been visited upon them as a punishment for their sins, including the desecration of the Sabbath; in other words, it was adopted as insurance against a recurrence of the scourge. That's the reason Pennsylvania in 1931 still keeps on its statute books, though it does not strictly obey or enforce it, one of the narrowest Sunday laws ever passed. The State is still propitiating the Lord God Jehovah.

Let us now turn to the field of evidence. Here there is, in the first place, the judicial oath, the mumbo-jumbo of every court proceeding. Its original theory was altogether different from what it is to-day. In early Christian times the oath was a conditional curse calling down upon the head of him who took it some dire evil in the event that he spoke falsely; and it was believed that a violation would put the curse into immediate and automatic effect. There were, however, so many false swearers who escaped the Lord's wrath that eventually the Fathers evolved the doctrine that violations were punished in the hereafter instead of here. This is the doctrine that later became incorporated into the English Common Law and was inherited by us. With it, of course, we got the obverse—the pious rule that a witness is not qualified to take the oath if he does not believe that there is a Supreme Being who will hereafter reward the good and punish the wicked.

That is the Common Law rule; and it still prevails in this country wherever it has not been judicially modified or changed by constitutional or statutory provision. Judicially, it has been modified in some States so that a witness need no longer believe in a future state of rewards

and punishments: it is sufficient if he believes that false swearing will be punished *either* here or hereafter. The constitutional and the statutory changes are of two kinds, first, those that abolish religious tests altogether; and, second, those that declare a person competent to testify regardless of his religious views, but permit him to be cross-examined about them for the purpose of impairing his credibility before the jury. Where the latter rule is in effect the assumption, of course, is that the heretic and the infidel are not as worthy of belief as the professing religionist.

The rule last mentioned prevails in some States in spite of constitutional provisions that would seem flatly to prohibit anything of the kind. For instance, the Indiana constitution provides that "no person shall be rendered incompetent as a witness in consequence of his opinions on matters of religion", but there is a statute just the same which says that "the want of religious belief may be shown on the trial".

It is in New York, however, that the history of the modification and final abrogation of the Common Law rule shows most clearly how difficult it is to bring about any reform in law when the proposed change conflicts with the religious prepossessions of judges on the bench. For, in spite of the fact that the New York constitution was amended in 1846 so as to provide distinctly that "no person shall be rendered incompetent to be a witness on account of his opinions on matters of religion", it was not until fifty-seven years later that the Court of Appeals made this provision effective. During that long period the religious psychology of the judges thwarted the will of those who put the amendment into the constitution, and it was theology and not law that the courts administered.

The story begins twelve years after the adoption of the amendment in question, when Judge Balcom of the Supreme Court held that in spite of the change in the constitution a witness might still be examined regarding his religious belief for the purpose of affecting his credibility. His Honor, righteously horrified, exclaimed:

> Persons may be competent witnesses but not credible ones. To say that a person whose religion teaches him that his happiness will not be diminished in time or eternity by the utterance of falsehood as a witness is entitled to equal credit in a court of justice with one who believes the doctrines of the Sacred Scriptures is absurd. And I think, inasmuch as the barrier against admitting unbelievers in anything heavenly or divine to testify has been thrown down in this State, witnesses may be compelled to disclose, on cross-examination, their opinions on matters of religious belief; for, however awful their opinions may be, they are of their own choosing. (Stanbro *v.* Hopkins, 28 Barb. 265.)

This sentiment, by the way, was repeated in paraphrase only last year by the Supreme Court of North Carolina in the notorious Gastonia murder case. (State *v.* Beal, 154 S. E. 610.)

Such was the status of the law when in 1891 the case of Johann Most, the anarchist, came before the New York Court of Appeals. Most and his witnesses had been examined, as radicals always are, about their religious beliefs, and the district attorney had argued in his address to the jury that they were unworthy of belief because they did not believe in God. Now, note what the highest court in the Empire State said in answer to the argument of Most's counsel that all this was an invasion of his rights: "The exception to the question put to the witness on cross-examination as to his belief in a Supreme Being is frivolous." Forty-five years after the constitutional amendment—frivolous!

Twelve years more went by, and the same question was again presented to the Court of Appeals in a civil suit by a respectable man of affairs. Two judges still clung to the decisions in the Stanbro and Most cases, but the majority, speaking through Judge Cullen, said:

> If, despite constitutional enactment that no such test of competencey shall longer prevail, inquiry on the subject is still to be made with reference to the witness's credibility, I think that we may be led into great embarrassment. I think that the learned court in the Stanbro case failed to appreciate that when the constitution abrogated all disqualifications for office or civil rights, the consideration of a witness's religious belief or the question of his credibility necessarily fell at the same time. (Brink *v.* Stratton, 176 N. Y. 150.)

Thus the constitutional provision of 1846 went into effect after a wait of fifty-seven years!

As the matter now stands, the Common Law rule, in either its original or its modified form, still prevails in ten States, so that in those States unbelievers are wholly incompetent to testify; in eight States unbelievers may be sworn, but may be examined regarding their religious beliefs for the purpose of discrediting them before the jury; in the remainder of the States there can be no inquiry regarding the religious belief of a witness for any purpose. Finally, the old Common Law rule prevails in the Federal courts in all the States that existed in 1789, when the Federal Judiciary Act was passed, and in all other States in which the rule had not been abrogated prior to their admission into the Union, except that in civil cases the Common Law rule was abrogated in 1906.

There remains a peculiar class of cases in which the question of religious belief may still be raised, even in States where in other cases it would be wholly ruled out. These are cases involving dying declarations, which constitute an exception to the ordinary rule against hearsay evidence. Such declarations are admitted on the trial of an accused in a homicide case when they have been made by the wounded victim of the criminal assault in fear and contemplation of imminent death. But it has been frequently held that the declarant's statement may be impeached by showing that he was an atheist. In Missouri there has been a decision to this effect within the last ten years, although a witness cannot ordinarily be interrogated at all regarding his religious belief in that State. Even the United States Supreme Court has given the rule its approval. (Carver *v.* U. S., 164 U. S. 694.) This means that if an unbeliever is murdered and in the face of death makes a solemn statement identifying a given individual as his assailant, his dying declaration either will not be admitted at all or else evidence may be introduced to show his lack of faith for the purpose of impeaching and impairing the value of his statement. It is, therefore, comparatively safe for Christians to murder unbelievers if there are no Christian witnesses.

An absurd quirk in this connection is the rule that the dying declaration will not be admissible if the declarant was not in a proper frame of mind when he made it. Thus, if he swore or used profane language in making his statement it is inadmissible, it has been held, because he was not looking with sufficient solemnity and apprehension on his approaching translation to either Heaven or Hell.

All this under a government of laws in a secular state! Mexico and Russia, on the other hand, have entirely abolished the judicial oath, and in China and Japan it has never been required.

III

Another domain in which the religious influence has been and still is potent is that of divorce. As every one knows, at the time this country was settled, marriage and divorce in England were under the jurisdiction of the church, which looked upon marriage as a sacrament, and no absolute divorce was granted by the ecclesiastical courts under any circumstances. The American colonies had no such courts, nor did the States that were later established. But the new States soon enacted general laws giving their civil courts power to grant divorces on certain specified grounds. These grounds were definitely scriptural according to the then prevailing views—adultery only, or adultery and desertion.

The new statutes were all short and said nothing about possible defenses. Hence, when they came before the courts for construction and application, the judges, swayed, like the legislators, by religious considerations, reached across the sea and brought over and incorporated into American law the rules and doctrines of the ecclesiastical courts of England, regardless of the fact that those courts did not grant absolute divorces, but only separations from bed and board. As the Missouri Supreme Court said in recent times:

> The action for divorce and alimony, the defenses thereto, and the proceedings therein, are, so far as suited to our day and situation, controlled by the law of the English ecclesiastical courts (Common Law with us) as modified, changed, and in some matters supplanted by our statutes.

It was in this way that the pernicious doctrines of condonation, collusion, connivance, and recrimination, and the requirement of a culprit in divorce cases, came into American divorce law, not by the authorized legislation of the duly constituted law-makers, but by the unwarranted legislation of religious-and-legalistic-minded judges on the bench. And it is in no sense an exaggeration to say that because of this judicial legislation and the assumptions behind it, sociologically sound legislation on the subject of divorce remains impossible in this country.

It is, however, in the field of criminal law that the religious influence is most baneful and far-reaching, first, because of the religious conception of the nature of crime, and, second, because of moral theology's conception of the psychology of the criminal.

Crimes were formerly classified as (1) those against God; (2) those against the prince; and (3) those against the individual. In the first category Blackstone placed eleven offenses or sets of offenses, namely, (1) apostasy; (2) heresy; (3) offenses which affect the Established Church; (4) blasphemy; (5) swearing and cursing; (6) witchcraft, conjuration, enchantment, and sorcery; (7) religious imposition; (8) simony; (9) Sabbath breaking; (10) drunkenness; and (11) lewdness.

Many of these offenses are, of course, obsolete. But, unbelievable as it may seem, witchcraft and religious imposition are still specifically mentioned and condemned in the statutes of many States, notably New Jersey, where it is a misdemeanor for any one to "personate Jesus Christ" or "to terrify, delude, or abuse the people by false denunciations of judgment", whatever that may mean.

Of course, blasphemy and swearing are still statutory offenses in a number of States. In Massachusetts there was a prosecution for blasphemy only four years ago, and in Maine there was a conviction ten years ago. In the latter case the court,

after referring to the Declaration of Independence, the oath of the President and other officials, the practice of having prayer in Congress, and other similar matters, said:

> In view of these things shall we say that any word or deed which would expose the God of the Christian religion or the Holy Scriptures to contempt and ridicule, or which would rob official oaths of any of their sanctity, thus undermining the foundations of their binding force, would be protected by a constitutional religious freedom whose constitutional limitation is non-disturbance of public peace? We register a most emphatic negative. (State *v.* Mockus, 113 Atl. 39.)

If that is not theological, rather than judicial, reasoning, the Fundamentalists are heretics.

Two ridiculous features of the laws against swearing and cursing are the fact that the time for the institution of prosecutions is usually limited to a few days and the fact that the fine is absurdly small. In Michigan, for instance, the prosecution must be started within five days and the fine is from one dollar to five for each oath. In Maine the prosecution must be begun within twenty days, and the fine is from two dollars to five. And in Pennsylvania the prosecution must be begun within seventy-two hours, and the fine is sixty-seven cents for each oath with the awful name of God in it, and forty cents for each in which Deity is not specifically referred to.

Lewdness, Blackstone explains, included in his time "many offenses of the incontinent kind" of which the ecclesiastical courts alone had jurisdiction. All these offenses, of theological origin, have been taken over by the secular courts, which, however, continue to look upon them through the eyes of long-dead theologians. It is on that account that we have the current holdings in obscenity, birth control, and censorship cases. The decisions are of the Twentieth Century, but their genesis lies in the far Christian past of the Western peoples, when sex was looked upon as incurably sinful, and it was the chief duty of the Church to repress the sin and punish the sinner.

Other present-day offenses that have their roots in religion are treason, sedition, perjury, attempts to commit suicide, libel, the new crimes under the anti-syndicalist and Prohibition laws, and contempt of court.

Treason in England formerly included the killing of either a secular or religious superior, on the theory that the system under which some men were high and others low had been ordained by God and that it was an offense against Him to offend against it. Sedition still includes any words or acts tending to "incite His Majesty's subjects to attempt the alteration of any matter in Church or State as by law established otherwise than by lawful means."

In that last provision the origin of our late sedition laws of shameful memory and our still popular anti-syndicalist laws is clearly discernible. Laws of this character hark back to the time when government was looked upon as something divinely established, when the Church either dominated the State or the two were as nearly one as the Siamese twins, and when in consequence the most serious offenses that men could commit were those that challenged either the Church or the State or their divinely appointed representatives. Such offenses were offenses against God Himself. Exactly the same emotional reaction that they evoked is manifested today by the Red-baiters and the more fanatical Prohibitionists. The old conception of the sanctity of the Church

and State and of the divinity that does hedge about a King has been transferred to the democratic State and to the Constitution.

A striking example of this transference is to be seen in a book written a few years ago by that militant Prohibitionist, Dr. Clarence True Wilson. He gave it the title, "The Divine Right of Democracy", which is a true key to its contents. In it he defends the Eighteenth Amendment as something sacred, and charges with treason all who would dare to lay profane hands upon it. He also defends capital punishment on scriptural grounds, and complacently informs the world that "God was a democrat".

As to libel, it was no less an authority than that patron saint of the law, Sir Edward Coke, who said, "Libeling and calumniation is an offense against the law of God". Likewise, contempt of court is plainly a survival of the old idea of the sanctity of the King. In England the writ in contempt cases still describes the contempt as being against him. The offense is clearly *lèse majesté* in modern dress. It is only twenty-eight years since the Missouri Supreme Court quoted a number of biblical texts as authority for its ruling that the Legislature could not by law limit the rights of the courts to punish for contempt committed out of the presence of the court. The extent to which this doctrine may be carried was illustrated in 1921 in an Arkansas bootlegging case. In that case the judge before whom it was pending met the defendant at a bathing resort and spoke to him in insulting terms. He was insulted in return, whereupon, swelling with injured dignity, he proceeded against the defendant for contempt of court and was sustained by the Supreme Court of the State. (Weldon *v.* State, 150 Ark. 407.)

IV

If modern criminology has learned anything it is that there is no common denominator for criminals and that every crime involves a synthesis of social, economic and biological factors. But the law still closes its eyes to these facts. The reason is that it has accepted the Christian postulate that, as expressed by a Catholic moral theologian a few years ago, "the chief cause of crime and, with few exceptions, always the efficient cause of crime, is the free-will". The law, in short, looks upon the criminal as simply a wilful sinner with a wicked heart who can and does choose wrong rather than right; and it tries him, convicts him, and punishes him on the basis of that postulate.

How it works may be seen in a case that came before the California Supreme Court last year. The defendant pleaded guilty to a charge of murdering three boys, ten, twelve, and eighteen years old respectively. Later his counsel asked him to withdraw the plea of guilty and to enter one of "Not guilty by reason of insanity". This change the court refused to permit, and the higher court sustained the ruling, though it said of the accused: "The evidence very definitely shows that the appellant is a moral pervert and moral degenerate of the lowest type. Upon the stand in his own behalf he readily admitted that for a number of years he had been addicted to the practice of the unnatural crime against nature." But he was pronounced legally responsible, and his conviction was affirmed. (People *v.* Northcott, 70 A. L. R. 806.)

The Vermont Supreme Court in 1919 under similar circumstances, where a defendant's attorney offered to prove that while his client's physical age was thirty-

four, his mental age was eight and he was an imbecile, affirmed the conviction, saying:

> The law makes no distinction between imbecility and insanity. The test of the law in all cases is, Did the accused, as applied to the act in question, have the mental capacity to understand the character, consequences, and quality of such act and successfully to resist the impulse to do it?

Just as the law still holds to this theological view with reference to criminal responsibility, so it takes the same view with regard to the treatment of the criminal. This is clearly shown in a statement by the Supreme Court of North Carolina, made in a case in which the defendant had murdered his wife in 1893 but had not been found out and tried until 1922. "Surely there is no pleasure," said the court, "to be derived from the punishment of the wicked, but it seems that this defendant ought to welcome an opportunity to expiate his crime and to make atonement for it." (State *v.* Wingler, 115 S. E. 59.) In other words, punishment is retributive, with a mystical element of expiation!

All this does not by any means exhaust the legal areas in which theological concepts have shaped and are still shaping our jurisprudence. There are in addition, just to name a few, the laws of descent, which are largely ecclesiastical in origin; the law of wills, which is plainly of priestly development; the laws exempting church property from taxation; the laws discriminating in favor of the clergy when they travel; and the Act of God doctrine in civil suits.

Enough has been said, I hope, to show that a condition precedent, as we say in law, to any rational reforms in the United States, either legal or judicial, criminological or penological, must be the severance of the umbilical cord which binds the law to theology. The complete secularization of our jurisprudence is absolutely essential. Theology and enlightened sociology cannot abide together.